Union of India Vs. the Triveni Engineering Works Ltd.

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Court : Delhi

Decided On : Dec-14-1980

Reported in : 20(1981)DLT255

Judge : Kajindar Sachar and; O.N. Vohra, JJ.

Acts : Monopolies and Restrictive Trade Practices Act - Sections 2

Appeal No. : Letter Patent Appeal No. 50 of 1974

Appellant : Union of India

Respondent : The Triveni Engineering Works Ltd.

Advocate for Def. : Mr. Lokur

Advocate for Pet/Ap. : N.K. Jaggi,; B.N. Lokur and; A.K. Tandon, Advs

Judgement :

Rajindar Sachar, J.

(1) The question for consideration in this appeal is how to calculate the value of assets within the meaning of Section 2(W) of the Monopolies & Restrictive Trade Practices Act (hereinafter to be called the Act) for the purpose of determining the registrability of an undertaking under Section 26 of the Act for the applicability of Chapter Iii, Part A of the Act which aims at preventing concentration of economic

power.

(2) This is an appeal against the order of Prakash Narain,J. (as his lordship then was) by which he quashed the impugned notices dated November 1,1971 and December 29, 1971 and prohibited the prosecution of the respondent company for its alleged non-registration under Section 26 of the Act.

(3) Chapter Iii of the Act deals with regulation of concentration of economic power, the obvious purpose being to regulate the monopolistic tendencies in the economy of the country. Part A of Section 20 of the Act applies to an undertaking if the total value of its own assets, or its own assets together with the assets of its inter-connected undertakings is not less than Rs. 20.00 crores. The value of assets is defined in Section 2(w) of the Act to mean the value of its assets as shown in its books of account after making provision for depreciation or for renewal or diminution in value. Explanationn to Section 20 clarifies that the value referred in the case of an undertaking will be the value of assets on the last date of his financial year which closes during the calendar year, immediately preceding the calendar year in which the question arises as to whether this power does or does not apply to such an undertaking. Section 26 of the Act requires that every undertaking to which Part A applies at the commencement of this Act or to which the provisions of that part becomes applicable thereafter, shall within 60 days from such commencement or the date on which that part becomes first applicable to it, make an application to the Central Government for its registration as such undertaking. Section 48(2) of the Act provides that if any undertaking to which Part A of Chapter Iii applies fails without any reasonable excuse, to make an application under Section 26, to register itself as an undertaking, then the undertaking shall be punishable with a fine which may extend to Rs. 1,000.00 and where the offence is a continuing one, with a further fine of Rs. 50.00 for every day, after the first, during which such failure continues. The respondent company was informed by a letter dated 9.7.1971 that according to the information with the Central Government the undertaking was registers bie under Section 26 of the Act and asking it to show cause why it has not done so and why proceedings under Section 48(2) of the Act be not taken against it.

(4) The basis of proceedings against the respondent was alleged to be that 8 undertakings which were mentioned were said to be inter-connected, either because they were under the same management in terms of Section 2(g)(iii)(c) of the Act or one of them being subsidiary of the Other under Section 2(g)(iii)(b) or they were under the same management in terms of Clause (c) read with Section 370(IB)(ii) of the Companies Act on the ground that the majority of the directors of the one body constitute a majority of the directors of the other body. The total assets of the inter-connected undertakings were said to be 21.55 crores and thus registerable under Section 26 of the Act. The respondent disputed its liability for registration on the ground that neither was any inter-connection established nor did its value of assets exceed Rs. 20.00 crores. The learned Judge accepted the company's contention and by his impugned order dated20.12.1973 found that the show cause notice which threatened prosecution on failure to register was a sufficient justification for interference. He quashed the impugned notice and prohibited the prosecution of the respondent. The Union of India has come up in appeal.

(5) At the time when the matter came up for hearing before us the respondent undertaking Along with the inter-connected undertakings had un Ii doubtedly crossed the limit of 20 crores value of assets, and had on its own subsequent to the judgment of the learned single Judge registered itself under Section 26 of the Act. Mr. Lokur, the learned counsel for the respondent has, thereforee, submitted that so far as the question of registrability of the respondent is concerned it was no longer being resisted. Normally in view of the fact that the undertaking has been registered under the Act the appeal may not have been pursued. The Union of India's counsel however, submitted that no doubt the question of registrability was no longer a live issue the appeal may be disposed of on merits for the reasons that certain findings and principles regarding the question of applicability of the Act (which are contested) have been laid down by the learned single Judge and as those would continue to govern the future cases it was essential that a considered decision he given on those points in the appeal so that the parties as well as the Union of India know the position in law.

(6) In the Judgment of the learned single Judge it is mentioned that the Central Government claimed inter-connection on the ground that Sawhney's control 52% of the equity capital in the undertaking. The learned counsel for the appellant contended that there seems to be some misapprehension because it was never the case of the Union of India that simply because the majority of shares are held by persons whose sub-caste may be Sawhney the undertakings become inter-connected. As a matter of fact it was specifically pointed out that three undertakings i.e. (i) M/s. Magakajagnu Sugar Mills Co. Ltd.; (ii) R.B.L. Tirath Ram Shah Ishar Das Ltd. and (iii) Ganga Sugar Corporation Ltd. were said to be under the same management because two brothers and their uncle held majority directorship in these companies and, thereforee, these bodies Corporate would be deemed to be under the same management within the meaning of Section 370(IB) clause (ii) wherein it is laid down that if a majority of the directors of the one body constitute, or.....a majority of Directors of the other body, the two bodies corporate shall be deemed to be under the same management. Thus these three undertakings were obviously inter-connected.

(7) M/S. Upper India Sugar Mills Ltd. was inter-connected with M/s. Mahalaxmi Sugar Mills Co. Ltd. because two brothers are managing directors of these two companies, and would be under the same management in terms of Section 370(IB)(i)(a) because the Managing Director of one body corporate is also Managing Director of the other body.

(8) M/S. Triveni Engineering Works Ltd. was a subsidiary of M/s. Upper India Sugar Mills Ltd. and would be inter-connected because of provision under Section 2(g)(iiii)(b) of the Act.

(9) Similarly M/s. Ramkola Sugar Mills Go. Ltd. is subsidiary of M/s. Ganga Sugar Corporation Ltd. and would be inter-connected.

(10) M/S. Rewari Electric Supply & General Industries Ltd. is a subsidiary of M/s. Upper India Sugar Mills Ltd. and would be interconnected.

(11) Mr. Lokur had also sought to urge that for the purpose of aggregating the assets, the value of investment in the shares of subsidiaries by the holding

company should be excluded. We cannot agree. Shares held in the subsidiary appear as investment in the balance sheet of holding company and have a value and are even pledged by the companies to secure finance. This however, does not prevent the subsidiary company from having assets out of the money paid by way of subscription to the shares held by the company. Thus it is a misnomer to say that when the assets of the holding and the subsidiary company are aggregated there is a double accounting. The assets of the holding and subsidiary company arc available to each company separately for raising further finance and to increase its economic power, thus leading to more concentration in fewer hands as the money which has gone to the subsidiary for the purpose of its assets and shares which are held by the holding company are two independent assets available to both the companies separately. Inter connection being established, the distinction in assets of the two separate undertakings is not thereby lost. Inter-connection has not the result of amalgamation and merger of these undertakings. Both the undertakings still retain their separate legal entity. It is only for the purpose of inter-connection under the Act that they arc treated as one unit and that also for the purpose of calculating the value of their assets. We see nothing wrong in principle or against the provisions of the Act in this approach.

(12) Mr. Lokur, learned counsel for the respondents did not dispute that all these companies would be inter-connected on the above basis. He only wanted to object to the undertaking being inter-connected if it was to be held on the basis of Sawhneys holding majority shares. But this is not the stand of the Union of India and as already mentioned on the grounds indicated above Mr. Lokur was not able to challenge that the inter-connection between the undertakings was established. The finding of the Central Government, thereforee, cannot be objected to on this ground. But as we said that in view of the respondent having registered itself that question is no longer alive and need not be pursued further.

(13) The next and the real important question is about the meaning of value of assets. The learned Judge was pressed to hold that the value of assets must be computed by importing the concept of value of assets in liquidation proceedings. This plea of the respondent was negatived by the learned single Judge and in our opinion correctly. The learned Judge had held that clause (w) of Section 2 of the

Act is to be construed by itself and not by relying upon the Companies Act or Income Tax Act, particularly when the legislature has in unambiguous phraseology laid down how the 'value of assets' has to be computed. This finding has our concurrence if we may say so with respect. The learned Judge has also held that the value of has to be taken is the value of the asset without qualification and the asset that will be included for computation of the value of asset would not only be what are called free asset but also assets subject to a charge on lien. This view has also our concurrence.

(14) The effort of the respondent to pursuade us to hold that notwithstanding the definition of the value of assets in the Act the liabilities of the undertaking should be deducted while determining the value of assets is not acceptable. It may be that in normal parlence assets may mean the net assets which would naturally be arrived at by deducting all the liabilities from the assets, the same test cannot be applied when giving a meaning to the value of assets used in the Act. One obvious reason is because the definition For the purpose of the economic power enjoyed by an undertaking the test cannot be a test only which will be applied in the liquidation proceedings to calculate as to how much is the net assets of an undertakings. The considerations for calculating net assets of an undertaking for the purpose of accounts and liquidation are very different because the considerations under Chapter Iii concern not merely accounts but the power, the influence that may be enjoyed by the availability of the assets that an undertaking had at any particular point of time. The reason is, as said by the Monopolies Enquiry Commission-'Big business by its very bigness sometimes succeeds in keeping out competitors. It, can do so by reason of its financial strength and that the very presence of big business in an industry is likely to have a different effect on the entry of smaller units, even in industries without any special scope for economic of scale.' Of course the Act does not proceed against bigness per se. All that the Act does is to regulate in public interest the working of these undertakings. It does not hinder growth. Figures show that 20 top business houses registered under Part A of Chapter Iii of the Act increased their assets from Rs. 2,430.00 crores in the year 1969 to 5401.70 crores in 1977, a clear pointer that growth of business is not impeded by the working of the Act. As the Act only requires the value of assets to be reduced by providing for depreciation or for renewal for

diminution in value, no further deduction in respect of any other item including current liability of the undertaking are permissible while calculating the value of assets for the purpose of Section 20 read with Section 2(w) of the Act. In Funck & Wag- nail's Standard Dictionary 'asset' has been defined as meaning in accounting, the entries in a balance sheet showing the properties or resources of a person or business as accounts receivable, inventory, deferred charges and plant opposed to liability. The assets also signify everything which can be made available for the payment of debts. Actually there is nothing very radical or extreme in the definition of the value of assets given in our Act. This definition is borrowed from the English Monopolies or Merger Act 1965. Section 7(B) provides that the value is to be determined by reference to the values at which the assets stand in the books of the relevant trade or business less any relevant provision for depreciation, renewals or diminuation in value. There is no change in this position under Section 64(1)(b) read with Section 67(2)(b) of the U.K. Fair Trading Act, 1973 which has repealed the Monopolies and Mergers Act, 1965. Similarly the Commerce Act of 1975 of Newzealand Section 68(5) defines the value of assets to be the value at which the assets stand in the books of the participants less any provision for depreciation, renewal, or diminution in value. It may also be noted that the word 'diminution in value' used in Section 2(w) is in juxtaposition with the position of depreciation, renewal and must, thereforee, derive its colour and meaning from these two expressions. Kohler in Dictionary for Accountants defines depreciation as the diminution of service-yield from a fixed asset or fixed asset group that cannot or will not be restored by repairs or by replacement of parts caused by wear and tear, poor maintenance, absolescence and inadequacy. Thus depreciation means a diminution in the original value of assets due to use or obiolescencc. Batliboi defines depreciation as loss or diminution in the value of an asset consequent upon wear and tear. Obviously current liabilities cannot be considered to be diminution in value of the assets of the company and the claim to deduct current liabilities from assets is unacceptable. The department must naturally, in computing the value of assets, make a provision for any diminution in the value of investment in shares with reference to the quoted rates. But if there is an increase in value of the current assets on account of the increase in value of shares the same is not taken into account. Obviously in view of the definition of

value of assets the department has no other option. Is it then fair to urge that while the appreciation in the value of assets of the undertaking should not be calculated the current liabilities which are not permitted by the statute should nevertheless be taken into account in reducing the value of assets. In our view there is no merit in the argument for a claim to deduct the current liabilities before arriving at the value of assets within the meaning of the Act. In this connection we must refer to certain observations of the learned Judge regarding the ascertainment of diminution to which the appellant objected. The learned Judge while accepting that if no provision is made for depreciation or renewals no deduction is permissible, has however, gone on to hold that even though diminution may not be reflected in the books of account or even the balance sheet it has to be worked out or provision made for it has to be done and unless that is done the value of assets cannot be arrived at, and this was one of the points why it found the opinion formed by the Central Government invalid. We are at a little loss to appreciate the exact logic of this reasoning. When the definition defines the value of assets to be as shown in the books of account after making provision for depreciation, or renewals or diminution in value it is specifically contemplating a situation that a provision for depreciation, renewals or diminution has to be found in the books of account. We cannot conceive a situation which the larned Judge seems to indicate that even if no diminution is reflected in the books of account or in the balance sheet the same has to be worked out to determine the value of assets. We should think that if no diminution can be spelled out from books of account the only conclusion is that there is no diminution. After all an undertaking must claim diminution before it can be allowed. In the absence of any date, to ask the Central Government to work out the diminution would be an exercise in conjecture and surmises. The illustrations of stocks of medicines or sugar becoming useless because of expiry date of medicines having passed or the sugar changing its colour does not present any difficulty. If it wishes to claim diminution, it must destroy medicine or sugar, and the same will obviously have to be reflected in the books of account. So unless it chooses to destroy the whole lot of the pharmaceuticals and sugar it cannot claim diminution in value of assets. If the undertaking takes the view that any stock of it has suffered diminution it must find mention and be reflected in the books of account. The value of assets has to be calculated on actual date and claim for

depreciation or renewals or diminution could only be claimed if supported by reference to the books of account. This claim must obviously be supported by some proof. We cannot, thereforee, accept, with respect, the finding of the learned judge that diminution must be provided for even though it is not reflected in the books of account and the balance sheet. We may also in this connection observe that the observation by the learned Judge that the balance sheet may or may not reflect the position of the company, according to its books, are rather too widely stated and do not correctly reflect the position in law.

(15) At every general meeting the Board of Directors is to lay before the company a balance sheet vide Section 210 of the Companies Act. Every such balance sheet shall give a true and fair view of the state of affairs of the company as at the end of the financial year and is to be in prescribed form vide Section 211. Sub-section (2) further requires every profit and loss account of a company to give a true and fair view of the profit or loss of the company for the financial year. Every balance sheet is to be signed on behalf of the company by the Board of Directors. Auditor appointed under Section 224 shall under Section 227 have a right to access to the books of account and vouchers of the company. The auditor shall make a report to the members of the company on the accounts examined by him and on every balance sheet and profit and loss account, and the report shall state whether in the opinion and to the best of his information and according to the Explanationns given to him the said accounts give the information required by the Act in the manner so required and give a true and fair view, in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year. If a default is made by the company in complying with any of the provisions of Section 225 of the Companies Act it shall be punishable with a fine. The auditor can also be proceeded under Section 233 for any default. It will thus be seen that the balance sheet is a very solemn document which in terms of the accounting reflects a true and fair view of the books of account. The reliance on the balance sheet cannot, thereforee, be said to be relying on irrelevant or extraneous material. Rather the balance sheet tells what the books of account contain.

(16) The next question concerns whether a deduction of Rs. 1,06,57,798.00 which was the advance tax paid should have been deducted from the total assets to

arrive at the value of assets within the meaning of the act. Now admittedly the value of the assets worked out by the appellant/Union of India mentioned in its notice of 9.7.1971 was 20.55 crores This however, included the above said amount of Rs. 1,06,57,798.00. If such an amount is excluded then evidently the assets would be less than Rs. 20.00 crores and the respondent at that time was not registrable. It is not disputed that this amount of advance tax paid has been shown in the books of account. Though before the learned Judge notwithstanding that this tax has been paid it was sought to be urged that this should be treated as a kind of deposit, the said position is not taken before us. Mr. Jaggi, the learned counsel for the appellant has now conceded that the department does not wish to urge that the advance tax, if it has actually been paid and is so shown in the books of accounts will nevertheless be added in the value of assets, we agree with the learned Judge that as the advance tax has actually gone out of the cotters of the company it cannot be treated as asset for the reason that the money is no longer available to the company for being used in its commerce or trade But what is seriously disputed by Mr. Jaggi is the further finding of the learned Judge that even a provision for tax whether of advance or income tax cannot be regarded as an asset of the company if accepted the result will be that even a provision for advance tax would mean the reduction of value of assets by that amount. We are unable to accept the correctness of this finding.

(17) We can readily understand that if the advance tax has been paid then to that extent the undertaking is no longer possessed of those assets and it would be wrong on any principle of law or accountancy to include that amount in the assets which are no longer available with the company. But so far as a mere provision for the advance tax is concerned we see no reason why the said amount will not be considered to be an asset for so long as the said amount is not actually paid out. It should be seen that in order to determine the total value of the assets in terms of Part A Explanationn to Section 20 makes it clear that the value referred in this Section shall be the value of assets on the last date of its financial year which closes during the calendar years immediately preceding the calendar year in which the question arises as to whether this part does or does not apply to such undertaking. Thus the valuation of the assets has to be done on the date given in the Explanationn i.e. last date of the financial year. If on that day advance tax has

been paid the same naturally cannot he included for the purpose of arriving at the value of assets. But if assuming that the last date of the financial year is the month of June and only the first Installment of advance tax had been paid it would not be correct to reduce the value of assets by the advance tax which may have to be paid in September, December or the March of the succeeding year. The reason is that the value of assets has to be calculated with reference to a particular date. If on that particular date any amount of advance tax had been paid the same is naturally deductable. As Section 211 of the Income Tax Act makes it clear the advance tax is payable in three equal Installments during the financial year i.e. by 15th Jume and 15th September and 15th December, for which the previous year is to be 31st of December and in other cases 15th of September and 15th of December and 15th of March. The scheme of the advance tax only enables an asessee to formulate his own estimate of tax payable by him. There are two alternatives before a company either to show provision for taxation at a gross figure and show the tax paid in advance as a nominal asset or to show the provision for taxation as reduced by the advance tax paid. The latter alternative is the correct procedure to follow both in terms of law and in terms of accounts. The other alternative gives distorted and unreal picture showing increase in what are called the nominal assets. In fact, actual advance tax paid does not go to increase the assets. But the position is very different with regard to a mere provision for payment of advance tax which is not yet due and which is payable in future. The reason is that till the date for payment of that amount the funds will continue to be with the company which can utilise them for its advancement and expansion. It is no body's case that once a provision has been made in the books of account for advance tax or tax the said funds cannot be utilised by the company for its day to day proceedings till such eventuality arises. The provision for advance tax is only convenient and good method to anticipate a liability which the company has to discharge in months to come but that does not in any manner take away its control of the liquidity of the funds and its assets. In this connection one must make a distinction between the contribution to the employees provident fund, which are deposited in the provident fund trust account and cannot be utilised by the undertaking. In such a case this amount is not just available to the undertaking for being utilised for its own day to day purpose. Similarly if advance tax had been

paid the funds arc no longer available and obviously should not be included for increasing the value of assets of the undertaking. If however, the same have not been paid the amount is available with the undertaking and as the calculation has to be done with regard to the fixed date the total assets on that date must be counted. The observation of learned single Judge that even a provision , taxation will lead to the reduction of value of assets cannot be accepted by us as laying down correct law.

(18) As a result the respondents have been correctly held not have had value of assets exceeding 20 crores and, thereforee, were not registrable under section 26 of the Act. The respondents rightly objected to the notice given by the appellant and the learned Judge, thereforee, rightly quashed the same. Of course for practical purpose in the present case it makes no difference bacausc as already indicated the respondent has become registrable and has actually got itself registered.

(19) A feeble effort was made by Mr. Jaggi to urge that as only a show cause notice was issued the writ petition was not maintainable. The learned Judge has dealt with the matter in detail and in dour opinion has correctly come to the conclusion that the threatened prosecution was sufficient justification for the respondent to invoke the jurisdiction of the court. If the respondent was being proceeded against by misconstruing the provision of law which could result in the prosecution, the action of the appellant being unsupportable in law, the remedy by way of mandamus was appropriate remedy and the learned Judge rightly granted it.

(20) Thought thereforee, we would dismiss the appeal but the same is disposed of subject to the observations on some of the points mentioned above. No costs.